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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1961

No. 241

SUNKIST GROWERS, INC., a corporation and THE EXCHANGE PRODUCTS COMPANY, a corporation,
*Petitioners,*

v.

WINCKLER & SMITH CITRUS PRODUCTS CO., a corporation and RONALD WALKER, as Trustee of Winckler & Smith Citrus Products Co.,
*Respondents.*

## PETITIONERS' BRIEF IN REPLY TO BRIEF FOR RESPONDENTS

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## PETITIONERS' BRIEF IN REPLY TO BRIEF FOR RESPONDENTS

### PRELIMINARY STATEMENT

Notwithstanding the limited grant of certiorari in this case respondents argue it as though it were here at large. The bulk of their argument relates to questions and issues that are irrelevant to, and are not within the scope of, the one question to which certiorari was limited. We do not intend to be led down a side alley by replying in detail to matters that in the

instant context are irrelevant, thus, in effect, arguing a case that is not here instead of the one that is here. (See, Point II, *infra*.)

Respondents' statement of facts is as irrelevant as the argument postulated on it. If the questions they discuss were properly cognizable in the present posture of the case, considerable correction and supplementation of that statement would have to be made. It will be enough, however, to make only such corrections as are significant to the argument to be presented by us. They will be made in the course of that argument.

Respondents say that the question presented by us does not arise. (Resp. Br., 30-42.) Yet, curiously and inconsistently enough, when they re-state the question involved they do so by adopting virtually *verbatim* our statement of the question. (Compare, *Resp. Br.*, 2 with *Pet. Br.*, 2.*) Thus recognizing that the question is presented, they have barely a word to say about it. They do not meet it on its merits. They seek to avoid it by arguing other questions that are not here.

In essence, what respondents argue is that the judgment in their favor in the District Court should be affirmed because (1) petitioners had and abused monopoly or market control of by-product oranges in the California-Arizona area; and (2) petitioners conspired not merely with ELP, another of the Sunkist grower-members processing instrumentalities but with outsiders in the persons of TreeSweet and Silzle. Neither of these questions is within the bounds

* To the abbreviations listed at page 3, note 1, of the Brief for Petitioners, add "*Resp. Br.*" for Brief for Respondents, and "*Pet. Br.*" for Brief for Petitioners.

of, or relevant to, the one question to which the case here is limited as may be readily shown. (See, Point II, *infra.*)

Respondents brush off the "six acts" (see, Pet. Br., 10-12) as being of practically no importance in relation to the conspiracy alleged. The main thrust of their argument now is that monopoly power was abused, upon which ground alone, they say, the judgment below ought to be affirmed. The six acts are important, seemingly only as the instruments by which that abuse was consummated. (Resp. Br., 4-5, 44-47, 55-56.)

In the trial court, however, the six acts were given a much higher rating. There, conspiracy, in pursuance of which the acts were done, was the principal ground upon which a judgment in favor of the respondents was sought. So much so was this true that the jury interrupted its deliberations to return to the courtroom to ask for additional instructions about the six acts. (R. 3732.) The trial judge gave those instructions and in doing so virtually restricted the jury's considerations to conspiracy and the six acts—all with respondents' agreement and over petitioners' objection. (R. 3732-3735.) The jury was told:

> "There is a charge of violation of the antitrust laws in this case, but the burden is on the plaintiff to go further than merely show a violation of the antitrust laws. Plaintiff *must show* that its damage came from *one or more* of six particular acts or things which were complained of.
>
> "Those were the six things which I spoke of as being the acts complained of . . ." (R. 3732-3733. Italics ours.)

The trial judge then enumerated and explained the six acts (R. 3733-3734); and it is significant that none of them was the "abuse of monopoly power" alleged (R. 271-272) or to which respondents now so single-mindedly devote themselves. A clear distinction between the two theories was made below by respondents in tendering the issues of their case. (Compare, R. 265-270 with R. 270-272.) So, too, when the Court of Appeals affirmed it did so in an opinion in which it discussed, as a ground of affirmance, intra-cooperative conspiracy and the six acts, but not abuse of monopoly power. (R. 3980-3985.)

The question to which this case on certiorari is limited relates to its conspiracy, not to its monopoly, aspects.

## ARGUMENT

### I

### The Instructions Given the Jury Were Erroneous and They Raise the Question Here Presented

Respondents argue that the single question here involved does not arise because the instructions taken as a whole submitted to the jury only the theory of a conspiracy with outsiders. (Resp. Br. 30-42). They also say the instructions were not objected to. (Resp. Br., 32 (n. 39).) They are wrong. The theory of intra-cooperative conspiracy was submitted; and petitioners objected to it.

*First:* No doubt instructions on any given subject must be read as a whole. That does not mean, however, that any significant part of them is or can be eliminated by or in the process of so reading them. It is precisely because instructions are to be taken as a whole, and because the jury in this case were told to read

them that way (R. 3679), that the instructions of which we complain were fatally prejudicial. They had the necessary effect of qualifying every other instruction given relating to the kind of a conspiracy that would be illegal, by injecting the theory of intra-cooperative conspiracy into the case.

It will be recalled that when the charging of the jury was apparently completed, the trial judge, after first incorporating by reference all objections that had been made in the course of settling the instructions, asked if there were "any further objections." (R. 3725) Counsel for petitioners replied that the "conspiracy alleged—is a conspiracy of the five, that is to say, with TreeSweet, Silzle, ELP—"; that the jury had not been told this; that there was the same omission to refer to such a conspiracy in the references to a conspiracy to monopolize; that this was an objection to the charge; and that the point of the objection was that the court's charge "related only to the two defendants, rather than mentioning the three others." (R. 3727.)

It was in an effort to overcome this objection, that the trial judge told the jury that the "charge is not that the defendants conspired. The charge is that the defendants and co-conspirators conspired." (R. 3730.) He did not, however, leave the matter there. He immediately followed up the quoted passage with this:

> "However, as a matter of fact, you may find that nobody conspired, or you may pick out and decide that some number *less than the total* conspired. It is your task to decide the facts." (R. 3730. Italics ours.)

This plainly enough, left the jury free to find that the only conspirators were Growers, EOP and ELP.

That was made certain by the other specific instructions given. (Pet. Br., 17-18.) Thus the jury were told, and they could not but have believed, that it was not necessary that Treesweet or Stiule—the only two outsiders—have been conspirators in order to pin liability on the defendants. Furthermore, having due regard to the occasion on the context in which the quoted instruction was given, the jury must inevitably have believed that the "less-than-the-total" qualification applied to everything that the judge had previously said about a conspiracy among the defendants and co-conspirators. Especially must they have so construed the charge in view of the instructions that they "must consider the instructions as a whole." (R. 3879)

It is just because the jury were told this that, in order to determine whether they were erroneous as a whole, all of the instructions on a given subject had to be brought together. And, of course, it is no cure of whatever error or inconsistency appears upon such total consideration that the various instructions on the subject were given in different parts of the charge, separated from each other by instructions on a variety of other subjects. A charge to the jury upon a given subject is to be judged by its content as a whole, not by the hour or minute of its delivery or its place along with instructions on other subjects.

In our brief, we brought together all the instructions given on the subject of conspiracy. (Pet. Br., 17-18.) We did so because, as respondents emphatically insist, instructions must be considered as a whole. Obviously, the error of which we complain was not cured by instructions on the many other and wholly independent subjects to which respondents address them-

selves at such length. (Resp. Br., 33-39) A correct instruction does not cure the error of an incorrect one unless the latter one is clearly corrected or repudiated. *Cummings* v. *Pennsylvania R. Co.*, 2 Cir. 45 F. 2d 152, 153-154; *Puget Sound Nav. Co.* v. *Nelson*, 9 Cir., 59 F. 2d 697, 700. Certainly, error in respect of one subject is not cured by an instruction on a wholly different subject.

*Second:* While the theory of conspiracy with outsiders was submitted it was clearly not the trial court's intention to limit the jury's consideration to that theory. (See Resp. Br. 28, 33). Rather, it was demonstrably its intention to permit them to find, as the predicate of liability, a conspiracy to which only the component parts of the Sunkist organization were parties. This demonstration is made by putting together the following facts:

1. Although requested so to do, the trial court refused to instruct that the Sunkist cooperative organization constituted a single cooperative organization that could not conspire with itself. (R. 182-183, 3253-3255.) Had such an instruction been given it would have been clear that someone not a part of the Sunkist organization had to be a conspirator, before liability could be imposed on the defendants.

2. Petitioners requested instructions that would have told the jury that unless they found that Sunkist Growers or Exchange Orange conspired with one of the outsiders, *i.e.*, with either Tree Sweet or Silzle, their verdict would have to be for the defendants. (R. 178, 185-186, 196-197.) The requested instructions were modified by the trial

court so as to include ELP, disjunctively, as one of those a conspiracy with whom would impose liability. (R. 3711-3712).

3. At pre-trial and throughout the trial petitioners consistently asserted and maintained their position that to be unlawful the combination or conspiracy with which they were charged had to include as participants, not the Sunkist cooperatives alone, but one or more "outsiders." The trial judge just as consistently disagreed with them. (See, *e.g.*, R. 435-436, 443-444, 2848-2849, 2858-2861, 2877, 2878, 3242-3243, 3272, 3278-3280, 3290, 3353-3354, 3461.)

*Third:* Respondents assert that the instructions of which we complain "were based upon instructions, requested and approved by petitioners without the objections now made . . ." (Resp. Br., 32(n. 39).) That assertion is wrong. These are the facts shown by the record:

1. The instruction that Growers and EOP could combine or conspire together (R. 3688-3689) was requested by the respondents as their "No. 2." (R. 145, 146) It was objected to by petitioners on the ground "that under the evidence Exchange Orange and Sunkist Growers cannot conspire under the Capper-Volstead Act, because they are both cooperatives owned by the same growers." (R. 2849) On another occasion, when this instruction was under discussion, counsel for petitioners said ". . . Our view is that the members of the Sunkist system should be treated as a single unit, just as if they were one company. That means if they conspire with Tree-Sweet or with

Silzle, they are subject to the antitrust laws, but under the Capper-Volstead Act, it is our position that they cannot conspire among themselves for this reason. . . ." (R. 2857-2859. See, also, to the same effect, R. 2877.)

2. The instruction that there could be no verdict against Growers or EOP unless it was shown that they conspired with ELP *or* TreeSweet *or* Silzle (R. 3711-3712), was a modification by the court of instructions requested by the petitioners. Had they been given as requested, however, the jury would have been told correctly that the conspiracy for which liability could be imposed had to be with one of the outsiders, TreeSweet or Silzle. (R. 185-186, 196-197.) The modification added liability from conspiracy with ELP. Contrary to respondents' claim (see, Resp. Br., 32(n. 39)) petitioners' objection on the ground now urged was saved. At the conference with the trial judge over instructions, petitioners presented the one now being discussed, and pointed out that as presented it was not consistent with the court's "rulings up to date, with respect to the capability of the three co-operatives to combine and conspire among themselves . . ."; and that, "although we would like to submit this as it is, as an alternative we would be willing to submit one which . . . stated that Sunkist, Exchange Orange, Exchange Lemon, TreeSweet, or Silzle, rather than separate the five into two categories . . ." (R. 3271-3272.) The judge did not adopt the suggestion and the alternative instruction was never submitted to him or requested by petitioners. But, in response to the suggestion of that alternative, the judge said that

he had noticed that the instruction as offered "is not consistent with the other instructions that I have given. *You already have your point on that. . . .. You will not be waiving that point if we modify this particular paragraph.*" (R. 3272, Italics ours.) That paragraph was modified when the instruction was given and it is that modification of which we complain.

3. The instruction that there was only one conspiracy charged in the case (R. 3697) was part of a summary of the parties' contentions and of the pleadings. (R. 3690-3698.) It was given on the court's own motion. Certainly, it was not among the instructions requested by the petitioners. (See, R. 178-223). It was a correct statement of the respondents' allegation; but the instructions permitted a different conspiracy to be found.

4. The instruction that they could find that "some number less than the total conspired" was given, as we have seen, on the court's own motion, in an unsuccessful effort to cure an error in earlier instructions to which petitioners had objected. (R. 3725, 3727, 3729-3730).

The instruction just mentioned was interspersed among some corrective instructions on other subjects, all given in response to objections to the original charge made by petitioners as well as by respondents (R. 3725-3731); and no further objections were made. It is this incident to which respondents apparently refer when they say that petitioners "approved the instruction complained of . . ." (Resp. Br., 33(n. 39). That asserted "approval" must be judged in the setting in which it was made. When that is done it will be seen not to have been an approval of the instruction at all.

There were lengthy conferences with the trial judge over the instructions. (See, Resp. Br., 30 (n. 35).) In the course of those conferences, petitioners repeatedly asserted their position that a "conspiracy" between only the Sunkist cooperatives was not violative of the antitrust laws—a position that petitioners had maintained form the beginning of the cause. (R. 435-436, 443-444, 2848-2849, 2858-2861, 2877, 2878, 3234-3243, 3272, 3278-3280, 3290, 3353-3354, 3461.) The trial judge informed counsel that when the charge was given the objections made during the conference would be incorporated by reference, so that when counsel were called to the bench after it was given, for statement of objections, repetition would not be necessary; but, when so called to the bench, they could "make *additional* objections which might occur to you on the spur of the moment . . ." (R. 2830-2831). Italics ours.) After the charge had been delivered, counsel were asked if there were any "*additional* objections?" (R. 3725, 3726, Italics ours.) Some objections were made by both sides; the corrective instructions were given; and both sides indicated acquiescence in the corrections. (R. 3724-3730.) In this setting, the so-called acquiescence in the charge should not be interpreted as anything more than a disclaimer of "additional" objections.

The purpose of requiring an objection to an instruction is, of course, to give the trial court an opportunity to correct an error before the trial ends, instead of having to resort later to the cumbersome and costly method of ordering a new trial. In the instant case, it would be wholly unrealistic to assume that, after repeated efforts along that line had failed, another and formal repetition of petitioners' persistent objection

would have caused the trial judge suddenly to change his mind and reverse his frequently expressed view that the Sunkist cooperatives could conspire with only each other. Form would be unduly promoted over substance to hold that petitioners had foreclosed themselves from asserting a position they had consistently advanced to the trial court throughout the entire trial simply because on only one occasion they did not mention it.

## II

### Respondents' Argument Is Irrelevant to the One Question to Which Certiorari Was Limited

*First:* The theories of liability based on conspiracy with outsiders and on so-called abuse of monopoly power are irrelevent to the question here presented. These theories were, of course, submitted to the jury. But *so was* the theory of liability based on a conspiracy to which only the Sunkist cooperatives were parties. Whether it was submitted as prominently or in as much detail as the others is not the point. Since it was submitted it is entirely possible, even probable, that it significantly and materially influenced the jury into arriving at the verdict they rendered. We do not know they were not so influenced; nor do we know that the verdict was the product solely or at all of the other theories.

This being so, it is immaterial that, as respondents argue, the evidence relating to these other theories is sufficient to support the verdict, and that there was no error in the charge relating to them. Before the judgment entered upon the verdict can be affirmed it must also appear that there was no error in the charge relating to the third of the three theories submitted,

for that may have been the one that produced the verdict. The cases cited at page 19, note 14, of the Brief for Petitioners, plainly teach the doctrine just stated. (Pet. Br., 33 (n. 21).) Respondents make no effort to show the contrary. Indeed, they ignore the whole matter, tacitly assuming that these other and independent theories of liability are cognizable here notwithstanding that the verdict could have been, and for all we know was, grounded upon other evidence and another theory of law.

*Second:* The two other theories of liability are not within the scope of the one question to which certiorari was limited. That question, in brief, is whether combination or conspiracy, so-called, between the cooperative processing and marketing instrumentalities of one group of fruit-growers violates the anti-trust laws when pursuant to it there is done only that which a single trader could do to process and market his products. Obviously separate from and independent of that question are the questions whether the cooperatives had abused monopoly power, and whether they conspired with outsiders to whom the Capper-Volstead Act is not applicable. No doubt these latter questions were in the case below. We assume, however, that had it been intended to bring here every question inhering in the record the grant of certiorari would not have been limited and the case would not have been assigned to the summary docket.

A simple test exposes the out-of-bounds character of respondents' argument. Suppose, that as a ground of reversal *we* now sought to argue various errors occurring below in relation to these other two theories. We would clearly be beyond the bounds of the one certiorari question. Respondent's side of those two ques-

tions is just as much beyond the bounds. The negative of the argument is no more relevant than the affirmative would be.

*Third:* The three theories of liability mentioned above are independent of each other. Proof of one would not necessarily involve proof of either of the others.* Certiorari was limited to a question based on one alone of these theories. It follows, then, that the other two are not embraced within it.

## III

### Petitioners Had No Monopoly Power to Abuse

*First:* Respondents do not deny, or otherwise take issue with, our contention that for purposes of applying the Capper-Volstead Act the Sunkist cooperative organization is to be treated no differently from a single-entity cooperative. It is settled that a cooperative within the exempting reach of *Capper-Volstead* may lawfully do under the antitrust laws whatever a single trader may do. (See *Maryland & Virginia Prod. Assoc.* v. *United States*, 362 U.S. 458, 466-467; *United States* v. *Borden Co.*, 308 U.S. 188, 204-205.) Respondents do not deny that all this is so. Their argument is that petitioners had and abused monopoly power with resultant anti-competitive consequences. (*Resp. Br.*, 43-56). The argument is not cognizable here, as we have shown (see, Point II, *supra*) but we will answer it, because monopolization does not need a plurality of actors for its consummation and

* Monopolization is a violation of the antitrust laws for which conspiracy or concert of action with others is not an essential element. So, too, a conspiracy with TreeSweet and Slizie would be a different conspiracy from one with ELP.

so is a violation of the antitrust laws that a single trader can commit.*

The major and essential premise of respondents' argument is that petitioners, by reason of their control of 70% of the by-product oranges available in the California-Arizona area, had market control of or monopoly power over that commodity; and that by exercising their power, they eliminated Winckler from the national juice market. The premise is false; and with its collapse the whole structure rested upon it falls. Petitioners did not have market or monopoly control. They did not exercise any power to eliminate Winckler. The evidence in that regard is plain and unequivocal as we shall see in a moment.

To be sure, Sunkist grower-members produced and petitioners, therefore, controlled in 1951 about 70% of the by-product oranges available in the California-Arizona area. But the indicium of market control or monopoly power is not a mere matter of percentage, at least not until the figure is very much higher than the one here. (See, L. Hand, J., in *United States* v. *Aluminum Co. of America*, 2 Cir., 148 F. 2d 416, 424; *United States* v. *Columbia Steel Co.*, 334 U.S. 495, 528.) The true indicium, as respondents recognize (Resp. Br. 48), is the power to exclude competition whenever the monopolist desires. (*United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 224 (n. 59); *United States* v. *E. I. DuPont de Nemours & Co.*, 353 U.S. 586, 592; *Report*, U. S. Attorney General's Na-

* Respondents' argument is based on sweeping statements of asserted fact for which no references to the record are given and which the record does not support. We lay correction on one side for the moment, for the argument as made is demonstrably fallacious.

tional Committee to Study the Antitrust Laws (1955), p. 43.)

Petitioners did not have any such power. The evidence here clearly shows that to be so. It shows also that petitioners could not have eliminated Winkler, and did not eliminate that concern, from the juice market. That elimination was accomplished, without petitioners' knowledge or participation, by the refusal of Morgan Ward, Winkler's regular supplier who had an ample supply of oranges, to let Winkler have oranges in 1951 for processing into single-strength juice. The detailed facts in this connection are stated, with appropriate references to the record at pages 13-15 of the Brief for Petitioners, and need not be repeated. (See, also the Petition for Certiorari in this case, pp. 9-11.) The essential fact is that a substantial part of the available supply was in hands other than Sunkist's; the bulk of this supply was in the hands of Morgan Ward, Winckler's regular supplier; and the existence of this other supply negated Sunkist's alleged power of elimination. It is, therefore, clear that except for Morgan Ward's refusal in 1951, Winckler could not and would not have been eliminated from the juice market. Winckler was not a regular customer of Sunkist in 1951, and had not been since 1947.* (Pet. Br., 13-15.)

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*Morgan Ward had 12% to 15% of the total supply of by-product oranges in 1951, *i.e.*, not less than 54,000 tons for which, as he testified, there was "no home . . . outside of Winckler-Smith, Case-Swayne, Paramount and a few other small plants . . ." (R. 1561, 1609) In that year he let Winckler have 6000 tons, at a price that figured out to $30.04 per ton, but under a contract that required the oranges to be processed into frozen concentrate. (R. 1439-1440, 1530-1531, 1566-1575, 1596-1604, 2278-2280. Exhibit 55, R. 1569, R497.) Winckler had never used more than 9000

*Second:* The factual bases of respondent's argument in this connection are badly overstated. Correction is not really necessary, for the argument is fallacious even if it be assumed that the given bases are correct. In the interests of completeness, however, we call attention to some of the more important misstatements in respondents' presentation.

Morgan Ward was not prevented in 1951 by anything for which petitioners were responsible from selling by-product oranges at less than $40.00 per ton. In fact, he sold more than 80% of his supply at a lower price. (R. 1596-1597.) As we have seen his price to Winekler came out at $30.04 per ton for 6000 tons. (R. 1530-1531. Def. Exhibit AO, R. 1532 (not printed, but the original exhibit has been transmitted to the Court).) Obviously, he could have sold that quantity or more to Winekler at the same price without restriction of its use to frozen concentrate. And just as obviously, although he wanted to get $40 if he could, he did not have to charge a higher price in order to be competitive with Sunkists's $40-price. (R. 1596, 1597)

The processing-juice purchase contract with Tree-Sweet was not something new in 1951. Similar contracts had been entered into for several years, including

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tons in one season for single strength juice and it used that much only in one year, *i.e.*, in 1949 when it got 12,700 tons of which about 75% went into single strength. (R. 1004, 1015, 1027.) In the other years in which Morgan Ward was Winekler's main and regular supplier, it got from him 10,500 tons in 1949; and 11,500 tons in 1950, in addition to substantial quantities from other suppliers not including Sunkist; and of these quantities much less than all was used for single strength juice. (R. 1004, 1014-1016, 1027, 1436-1442, Def. Ex. BO; R. 2403, 2440.) It was Ward's failure in 1951 to continue that course of dealing that caused Winekler's single-strength troubles. (*Pet. Br.*, 13-15.)